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April 25. 1769.

MEMORIAL

FOR

James Sibbald ſhoemaker, and Convener of the Trades in Cupar of Fife, Purſuer,

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AGAINST

Mr Robert Macintoſh, Advocate, Mr James Dalgleiſh Sheriff-depute of Fife, and John Horſburgh Sheriff-clerk of Fife, Defenders.

THE memorialiſt having brought an action for damages and exhibition, againſt Mr James Dalgleiſh ſheriff-depute of the county of Fife, Mr Robert Macintoſh advocate, and John Horſburgh the ſheriff-clerk, on account of his being wrongouſly apprehended and impriſoned in the tolbooth of Cupar from the 4th till the 12th of November 1767, by Mr Dalgleiſh, at the inſtigation of Mr Macintoſh, a proof was allowed, a ſtate prepared, and thereafter memorials were ordered; in conſequence of which appointment, what follows is ſubmitted on the part of the purſuer.

In courſe of the law-ſuit between Mr Macintoſh and Mr Dempſter, the court had a full detail of Mr Macintoſh's political proceedings, and of his extraordinary conduct at taking the precognition; on which, therefore, it will be needleſs to enlarge at preſent:

ſent: The memorialiſt ſhall confine himſelf to ſtating the procedure againſt himſelf.

. 6. 1767. The memorialiſt was firſt brought, by a ſheriff-officer, before Bailie Robert Geddie, one of Mr Macintoſh's political friends, without any warrant being granted, or any application for a precognition having been made to Bailie Geddie by Mr Macintoſh. The memorialiſt found Mr Macintoſh with the Bailie and ſeveral others of that party, who obliged him to make oath, and anſwer ſeveral queſtions put to him, which were taken down in writing, and dictated by Mr Macintoſh: but the memorialiſt's wife having come for him, and he hearing her, as he imagined, ill uſed below where he was, he run out of the room, and did not return; ſo that
tate, p. 9. 10. 8. 39. the depoſition was left unfiniſhed.

ct. 19 1767. The memorialiſt was next apprehended, and carried before John Horſburgh ſheriff-ſubſtitute, after a petition for a precognition had been preſented for Mr Macintoſh, and warrant granted accordingly. The memorialiſt found Mr Macintoſh and his party with Mr Horſburgh, as he had formerly found them with Mr Geddie;
State, p. 11. D. 40. A. 41. A. and they informed him, the intention of bringing him there was to make him give his oath in a precognition about bribery and corruption. To which the memorialiſt anſwered, He did not think himſelf bound to do ſo; and refuſed to ſay any thing: upon which Mr Macintoſh inſiſted, That he ſhould be committed to priſon. But Mr Horſburgh made aviſandum to the ſheriff depute,
— p. 41. A. and appointed the memorialiſt to appear "perſonally before the "ſheriff to-morrow, at ten o'clock forenoon, within the tolbooth "of Cupar, in the ordinary court-room."

Nov. 4. 1767. The third and laſt time the memorialiſt was apprehended, in conſequence of a warrant from the ſheriff, by ſheriff-officers, the memorialiſt at firſt refuſed to make oath, putting his refuſal, to avoid offence as much as poſſible, upon the unreaſonableneſs of the hour, and the impropriety of the place; it being then late at night, and the ſheriff in a tavern. However, he was concuſſed to give his oath; and ſeveral queſtions were put to him, to which he made anſwers, that were taken down. At laſt ſeveral queſtions were put to him, with regard to his own conduct in the election,

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the tendency of which was to make the memorialiſt accuſe himſelf. Theſe he refuſed to anſwer.

In the mean time, the memorialiſt's wife, who was apprehenſive that Mr Macintoſh and his party were uſing her huſband ill, broke into the room; and an altercation enſued between her and Mr Macintoſh and his attendants. The poor woman ſeems on this occaſion, as is no wonder, to have loſt her temper, and to have expreſſed her indignation both by words and geſtures which were not altogether delicate. Though theſe were directed to Mr Macintoſh and his party, yet they pretended, that they were applied to the ſheriff, and inſiſted, that they ſhould be committed to priſon; though the truth ſeems to be, that they were entirely addreſſed to Mr Macintoſh and his friends. Thus they pretended, that ſhe lifted her hand to the ſheriff; upon which it is in proof, the poor woman ſaid, "My dear ſheriff, did I lift my hand to "you?" which ſhows, that ſhe had all proper regard to the ſheriff, and had not the leaſt intention to take any improper liberties with him, though ſhe thought ſhe had good reaſon to ſcold Mr Macintoſh and his party. State, p. 20. I

However, be this as it may, at the inſtigation of Mr Macintoſh, the ſheriff granted a warrant againſt the memorialiſt's wife, for contempt of authority, by ſtamping with her foot, &c. But the ſheriff was ſo ſenſible of the violence of this ſtep, that he, next day, of his own accord, ordered the gaoler to ſet her at liberty. — p. 25. A

The memorialiſt having perſiſted in refuſing to anſwer the queſtions put to him, he was committed upon the following warrant from the ſheriff. "By Mr James Dalgleiſh of Scotſcraig, advo- "cate, ſheriff depute of Fife. — Whereas the ſaid ſheriff is juſt "now employed in taking a precognition of facts, contained in a "petition and information exhibited to him by Robert Macintoſh, "Eſq; advocate, in the courſe of examining James Sibbald ſhoe- "maker in Cupar, and preſent convener of the trades there, Ka- "tharine Hutchiſon, ſpouſe to the ſaid James Sibbald, who had, "in the courſe of the ſaid examination, come into the room, and "behaved in a moſt contemptuous manner, and for which a war- "rant of commitment had been granted againſt her, having again "violently broke into the room, and the ſheriff having ordered — p. 27 A B, C, D, E.

"the

" the officers to carry her off, he the ſaid James Sibbald did go to-
" wards the door, and endeavoured to hinder the officers from do-
" ing their duty; and having refuſed to anſwer the queſtions put
" to him, the ſheriff therefore grants warrant to the ſheriff-mairs
" to incarcerate the perſon of the ſaid James Sibbald within the
" tolbooth of Cupar, therein to remain till he be liberate in due
" courſe of law. Given under the hand of the ſaid ſheriff, at
" Cupar, the 4th day of November 1767."

ſtate, p. 14. H. It appears from the proof, that it was with reluctance the ſheriff granted this warrant, and at the inſtigation of Mr Macintoſh.

The memorialiſt remained in priſon till the 12th, when he was liberated, upon his finding bail to anſwer in the precognition.

The memorialiſt apprehending himſelf to be greatly aggrieved by the above vexatious procedure and illegal commitment, brought an action for damages againſt the ſheriff-depute and Mr Macintoſh; and he is perſuaded little argument will be neceſſary to ſhow that his commitment was illegal, and therefore that he is intitled to damages.

Precognitions are no doubt proper and neceſſary in ſeveral caſes; as when a judge or public proſecutor makes inquiſition into a crime *ex officio*, or even at the inſtance of a private party, where the *corpus delicti* appears, and the crime is heinous: but both theſe requiſites ſhould concur; for it is abſurd to allow a precognition to inquire, whether or not a crime has been committed, of which there is no veſtige or evidence appearing; and it is evidently improper to allow a precognition about a petty delinquency, which the law puniſhes by a pecuniary mulct, to recover which there is no occaſion to reſort to the criminal court, or for a trial by a jury, an accurate libel, and a liſt of witneſſes, which are the true grounds that render a precognition neceſſary in heinous crimes.

But even in precognitions for inquiring into heinous crimes, there is no propriety in taking them upon oath. Such meaſure is evidently wrong: For, not to mention that oaths ſhould not be multiplied, it is wrong, *1ſt*, Becauſe it lays the perſons examined on a precognition under a reſtraint when they come to be examined

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as witneſſes on the trial; and, 2*dly*, Becauſe, if a man may be obliged to anſwer upon oath in a precognition, it is plain, that he may be committed for refuſing to ſwear againſt himſelf; which is manifeſtly improper and unjuſt. And accordingly, by the law of this country, the memorialiſt imagines that precognitions ought not to be taken upon oath. They might indeed, in certain caſes, by the 38th act, 1ſt parl. Charles II. which provides, that "at what time, "or whenſoever one ſhall accuſe a perſon or perſons to be guilty "of treaſon, murder, or other felony, blaſphemy, inceſt, or o-"ther heinous crimes; in ſuch caſes the ſaid juſtice or juſtices "ſhall forthwith cauſe ſuch perſon or perſons to be apprehended; "and after inquiry made in the cauſe, the ſaid juſtice or juſtices, "if they find cauſe, ſhall commit the offender to priſon, or take "ſufficient bail, if the caſe by the law be bailable; and ſhall take "the information of the party accuſing upon oath, and bind him "to proſecute; and ſhall take the teſtimony or depoſitions of the "witneſſes *likewiſe upon oath*, and bind them to give in evidence, "and ſhall alſo take the examination of the party accuſed."

This ſtatute only allows precognitions upon oath in heinous crimes. It does not define what a heinous crime is; but from the enumeration of particulars in the ſtatute, its meaning is extremely plain. The queſtion muſt be arbitrary, and no intelligent or impartial judge would heſitate about the determination of it.

However, it appears that even precognitions as to heinous crimes were found to be grievous; and therefore, by the articles of grievances, it is declared, "That the obliging the lieges to depone "upon crimes againſt delinquents, otherwiſe than when they are "adduced in *ſpecial proceſſes as witneſſes*, is a great grievance."

The defenders pretended, that this article did not apply to precognitions, and that it took its riſe from ſpecial circumſtances, as to which the memorialiſt did not well comprehend the argument for the defenders. The words of the article are as ſtrong againſt taking precognitions on oath, as words poſſibly could be. Very poſſibly ſome particular flagrant abuſes gave riſe to this article, which indeed is the caſe with moſt general regulations: but it would be ſtrange from that to limit them always to the preciſe caſes to which they owe their origin; eſpecially when there is not

a word in the regulation from which it can be inferred that the expreſſion is too broad; and that the general doctrine adopted is founded in good ſenſe and expediency, as is the caſe with the article of grievances in queſtion.

However, the memorialiſt has no occaſion to plead the point ſo high, as his action would not be hurt though it ſhould be underſtood, that precognitions in this country might in ſome caſes be taken upon oath: for that would not juſtify the taking a precognition upon oath in the preſent caſe. For here a precognition was not demanded in order to inform a judge, or public proſecutor inquiring *ex officio*. The application was at the inſtance of a private party. The crime charged was not at all of the nature of thoſe mentioned in the above ſtatute; nor did any *corpus delicti* appear.

Beſides, though it were lawful to examine, upon a precognition, perſons upon oath that were willing to give it, it does not follow, that it is lawful to compel, by impriſonment, perſons to give their oath in a precognition who are unwilling to do ſo; for this plain reaſon, among others, that a perſon may very often have juſt cauſe for refuſing to give his oath upon a precognition, which yet he cannot, and ought not to diſcloſe. This may often happen where the inquiſition is general; that is, when, though it appears a crime has been committed, yet it does not appear by whom; or when the offence charged is generic, as was the caſe here. For in ſuch general inquiſitions, a judge may come to put upon oath the perſon who himſelf committed the crime, or a perſon who would not be bound upon a trial to give evidence as a witneſs againſt him who committed the crime. Inſtances of this kind have happened; and not very long ago one occurred at a circuit-trial, upon the ſtatute to prevent artificers from leaving the country. Several workmen had been precognoſced upon oath, and, among the reſt, the man who was afterwards tried; and at the trial his oath in the precognition was produced in evidence againſt him; but very juſtly rejected by the judge. This demonſtrates the impropriety of taking precognitions upon oath; which indeed the memorialiſt, with ſubmiſſion, takes to be contrary to the law of this country, whatever errors may have crept into practice. At any rate, it clearly evinces the illegality of committing

a perſon who declines to anſwer a queſtion upon oath in a precognition; and that is ſufficient for the memorialiſt's purpoſe.

The defenders reſted their defence upon what they called the univerſal practice of taking precognitions upon oath.

As to this, the fact is, that it is the practice of ſome ſheriffs to take precognitions upon oath; and the practice of many of them never to do ſo. But it would not in the leaſt avail the defenders, though it had been the univerſal practice to take precognitions upon oath, unleſs they could ſhow, that it had been the practice to commit perſons who declined to anſwer in precognitions upon oath. Now, ſo far from doing that, the defenders were not able to mention one ſingle inſtance of a commitment for refuſing to anſwer upon oath in a precognition. Nor could the defenders pretend, that it had ever been the practice of any ſheriff to grant a precognition for inquiring into bribery and corruption in the heat of a political conteſt, or at any time. It would have been an abuſe to have granted a precognition even by declarations, on ſuch an account, and in ſuch circumſtances. And the memorialiſt has only to obſerve, that the defenders can plead no *bona fides* in this caſe, as it is in proof, that Mr Dalgleiſh, the ſheriff, told Mr Macintoſh, he was not fond of granting the warrant againſt the memorialiſt; which ſhows his ſenſe of the matter: and if he was but doubtful, he certainly ought to have leaned to the favourable, the merciful, and the ſafe ſide, and not ſuffered himſelf to be prevailed upon by the ſolicitations of Mr Macintoſh to ſport with the liberty of the ſubject.

The memorialiſt has been three times apprehended by ſheriff-officers, and has ſuffered an impriſonment of eight days. If theſe ſtrong meaſures againſt him were agreeable to law, he muſt put up with them; but if they were vexatious and illegal, he is ſurely intitled to redreſs. The ſeizure and confinement of a free ſubject is a ſerious matter; and all perſons, be their rank and ſtations what it may, ſhould be taught, that perſonal liberty is ſacred; and that no man is to be deprived of it raſhly, wantonly, or *politically*, but only according to the rules of law.

In reſpect whereof, &c.

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